No. 15086

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS H. SAPER, as Trustee in Bankruptcy of Riverside Iron & Steel Corporation,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

APPELLANT'S REPLY BRIEF.

ALEX D. FRED and
LOUIS M. BROWN,
756 South Broadway, Suite 524,
Los Angeles 14, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Preliminary Statement.

This reply brief is confined to answering the major arguments made by appellee in his reply brief. With respect to the other points discussed by appellee, appellant believes that his own opening brief presented the contrary arguments and authorities raising the issues involved on his appeal. He respectfully requests that the opening brief be referred to with reference to such points.

I.

There Is No Statutory Authority Permitting the Extension of an Attachment Lien on Personal Property Beyond the Three-year Period Provided for in Section 542b of the Code of Civil Procedure of California.

In his reply brief, appellee argues that the writ of attachment served on E. T. Foley on December 5, 1946,

continued to exist beyond the three-year period provided for the duration of a garnishment lien on personal property by Section 542b of the Code of Civil Procedure of California. (Appellee's Br. pp. 12-18.)

No express authority is cited by appellee for his contention. The only case involving an attachment upon which appellee relies is *Estate of Troy,* 1 Cal. App. 2d 732. This case is easily distinguishable from the instant one. In *Estate of Troy, supra,* the Court held that a statutory attachment of an interest of an heir in an estate remained valid and binding until final distribution even though such event occurred more than three years after the attachment. The Court, however, was careful to point out that: (1) it was only by virtue of the enactment of Section 561 of the Code of Civil Procedure that such interest of an heir was attachable; and (2) that the rights of an attaching creditor of an heir must be measured by Section 561 rather than Section 542b of the Code. The Court held, in part, at pages 735, 736:

> ". . . Section 561 is a special statute dealing exclusively in the attachment of the interest of an heir or legatee in the personal property of an estate. It is the only authority under which the probate court may make distribution to one who is not an heir or legatee . . . Before this section was enacted personal property in the hands of an executor was deemed to be in the custody of the law and as such not subject to attachment or execution. This section provided a remedy where none had theretofore existed and it laid down the procedure for making the remedy effective . . . There are many authorities holding that, where a right existed at common law, a statutory remedy is merely cumulative, but that, where the right is given and the remedy is provided by statute, the statutory remedy must be pursued . . .

> This respondent has strictly followed the remedy provided in the statute and we can see no reason why it should be denied the right because those over whom it had no control delayed the proceedings."

See also *Estate of Bennett,* 13 Cal. 2d 354, 366 *et seq.,* where the Supreme Court recognized the special nature of Section 561 of the Code of Civil Procedure.

In the instant action there is no statutory authority, as was the case in *Estate of Troy,* permitting the lien, if any, acquired by the service on Mr. Foley to extend beyond the three-year statutory period provided for in Section 542b. On the contrary, it appears that the legislative intent is not to permit the duration of a garnishment or attachment lien on personal property to extend beyond the three-year period. Thus, the Legislature in Section 542a of the Code of Civil Procedure of California provided that an attachment lien on real property may be extended "for a period not exceeding two years" by following the procedure outlined in said section. It failed to make any similar provision concerning personal property. It is submitted that the absence of any similar statutory language pertaining to personal property, indicates a legislative intent not to permit a lien on such property to extend beyond the three-year period provided for in Section 542b.

Statutes pertaining to attachments or garnishments must be strictly construed, and, in any event, the courts are powerless to enlarge upon the rights granted by the statutes permitting the use of attachment processes.

In *Brun v. Evans,* 197 Cal. 439, the court states at page 443:

> ". . . Attachment liens are solely creatures of statute. They can be created and can continue to

> exist only in the cases and to the extent to which the legislature by statutory enactment has authorized their creation and continued existence . . . Section 542a does not empower the court to create a lien where none exists, nor to revive a lien which has ceased to exist."

See also:

Stowe v. Matson, 94 Cal. App. 2d 678, 683.

As stated in 5 *Cal. Jur.* 2d 598:

> ". . . Proceedings by attachment or garnishment are creatures of statute. They have only the scope which the legislature has chosen to accord to them, and cannot be extended to cases not mentioned in the statute. A cardinal rule of the law of attachment and garnishment, therefore, is that the statutory provisions relating thereto must be strictly construed and followed."

The other cases cited by appellee in support of his contention are not in point. They relate to procedural rules concerning the running of the statute of limitations, the time for dismissal of an action, or the filing of a claim, etc. These cases do not pertain to the creation or existence of a statutory right as is the case in the instant matter. It is submitted that the rights of an attaching creditor—in this case the appellee—must be measured by the statutes creating such right. Section 542b is not a statute of limitations but is a substantive part of the right created by the California attachment statutes.

To imply exceptions other than those expressly mentioned in the attaching statutes to the clear language of Section 542b, which states that an attachment lien on personal property shall "cease to be of any force or effect" after

three years, it is submitted, does violence to the legislative intent. It in effect would constitute a judicial amendment of the attaching statutes. No California court has gone this far and in fact the appellate decisions recognize that the courts are powerless to extend the operation of an attachment lien except as specifically permitted by statute.

Brun v. Evans, 197 Cal. 439, 443;

Palmer v. Fix, 205 Cal. 472;

Clark v. Superior Court, 37 Cal. App. 732.

II.

Appellee's Argument Demonstrates That the Findings of the District Court Are Inconsistent and Cannot Support the Judgment.

On pages 19 and 20 of his brief, appellee takes issue with appellant's argument that if, as found by the District Court, the deposit with the Clerk of the Superior Court of the money was not *in custodia legis,* it follows that the August 12, 1948 attachment writ must necessarily have merged with the writ of execution of June 28, 1949. Appellant cited as his authority the recent case of *Durkin v. Durkin,* 133 Cal. App. 2d 283, which had the effect of crystallizing the rule expressed earlier in *Jones v. Toland,* 117 Cal. App. 481, 483; *Puissegur v. Yarbrough,* 29 Cal. 2d 409, 412; and *Jones & Son v. Independence Ind. Co.,* 52 Cal. App. 2d 374, 378.

Appellee seeks to distinguish the *Durkin* case on the theory that there both the lien of attachment and execution "expired prior to the deposit of the money into *custodia legis.*" However, in so doing he is now seeking to oppose —rather than uphold—the findings of fact in support of his judgment. As indicated in appellant's brief, the trial

court made specific findings that the deposit by Mr. Foley with the Superior Court Clerk did not have the effect of placing the money *in custodia legis*. [Tr. p. 57, par. 4.]

It is apparent from appellee's argument that he now seeks to avoid the findings of the District Court that (1) the money deposited by Foley was not *in custodia legis* and (2) that the writ of attachment of August 12, 1948 was valid. As pointed out in our opening brief, such findings are inconsistent with the finding by the District Court that the writ of execution of June 28, 1949 was not effective. The inconsistency of the trial court's findings have been recognized by appellee.

Appellee states that under Section 688 of the Code of Civil Procedure neither a cause of action nor the proceeds of a cause of action are subject to execution. Section 688, it should be noted, does not exclude the "proceeds of a cause of action" from execution as asserted by appellee. It states that "no cause of action nor judgment *as such,* shall be subject to levy or execution." (Our emphasis.) It also provides that among other things "all property and rights of property seized and held under attachment in the action, are liable to execution." In the instant action, the property which appellee has always claimed was the subject of the garnishments and executions was the money owed by Mr. Foley to Riverside. If this is so, execution would have been permissible under Section 688.

On the other hand, if in fact, it was the cause of action or claim of Riverside, appellee, contrary to his assertion,

could have obtained a lien on the proceeds by invoking Section 688.1 of the Code of Civil Procedure. Appellant asserts that this section is inapplicable because Riverside was not a "plaintiff" in the Foley action. It is obvious, though, that the word plaintiff is used in the section in the broad sense of a person having a claim against another. This is made clear by the later language of the section which provides that:

> "Such judgment creditor shall have a lien to the extent of his judgment upon all moneys recovered by his judgment debtor in such action or proceeding . . ."

The use of the word "plaintiff" in Section 688.1 is analogous to its use in Section 538 of the Code of Civil Procedure which provides that a "plaintiff" may obtain an attachment in certain instances. In *Aller v. Beverly Hills Laundry, Inc.,* 98 Cal. App. 580, 584, the court in construing the latter section held that "plaintiff" is "intended to mean the *claimant* or *moving party;* or, in other words, any party to the action seeking affirmative relief." (Court's emphasis.) It thus permitted a defendant who filed a counterclaim to obtain an attachment against the plaintiff. By a parity of reasoning, it is evident that the same construction would prevail in interpreting Code of Civil Procedure, Section 688.1; and that appellee could have obtained a lien on Riverside's interest in the Foley judgment. It should be noted that the District Court did not find that Section 688.1 of the Code of Civil Procedure was not available to appellee; instead it found that "no effort was made to impress a lien upon said judgment, or said fund pursuant" to said section. [Tr. p. 57, par. 5.]

III.

Appellee Has Gone Outside the Stipulation of Facts to Support His Argument That Appellant's Action Constituted a Collateral Attack on the Order of the Superior Court.

In support of his position that the appellant trustee's action herein constitutes a collateral attack on the order of the Superior Court, appellee has gone beyond the stipulation of facts upon which this case was submitted. Contrary to his assertion on pages 21 and 22 of his brief, there is no finding by the Superior Court, in the Foley action, nor by the District Court in this proceedings, that Riverside was "no longer interested in the fund." The Superior Court order of December 8, 1950 shows that Riverside was never served with notice of the hearing. It also shows that the Clerk was ordered to make payment to the Sheriff pursuant to the writ of execution obtained by appellee "for the use and benefit of Riverside Iron & Steel and Harlan H. Bradt." [Tr. pp. 44-45.]

For the reasons stated in our opening brief, appellant relies on the December 8, 1950 order of the Superior Court in support of his contention that the payment to appellee of the money pursuant to such order constituted a preferential transfer under Section 60(a) of the Bankruptcy Act.

Conclusion.

Appellant sincerely believes that the judgment of the District Court is contrary to the applicable law. Appellant believes that the authorities cited in his brief demonstrate that the appellee had no lien on the money he received antedating the four-month period of bankruptcy. He again urges this court to reverse the judgment and remand the case for further proceedings.

Respectfully submitted,

ALEX D. FRED and
LOUIS M. BROWN,
By ALEX D. FRED,
Attorneys for Appellant.